

*Extra*1 THE HONORABLE PARIS K. KALLAS
2
3
4
5
67 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
8

9 ZANGO, INC.,

10 Plaintiff,

11 v.

12 KASPERSKY LAB, INC.,

13 Defendant.

14 No. 07-2-16532-1 SEA
15 PLAINTIFF ZANGO'S MOTION FOR
16 TEMPORARY RESTRAINING ORDER17 I. RELIEF REQUESTED
18

19 Plaintiff Zango, Inc. ("Zango") is a Bellevue-based company that provides content to
20 its customers via the Internet. On May 21, 2007, Zango learned that an anti-virus program
21 manufactured and distributed by Kaspersky Lab, Inc. ("Kaspersky") is blocking users from
22 downloading Zango's products, and damaging and interfering with the use of Zango software
23 and products by existing Zango customers. In addition, Kaspersky's application has been
24 damaging Zango's website in such a way that users are prevented from downloading Zango
25 products since early March. There is no justification for Kaspersky's attack on Zango's
products. Richard Purcell – a world-renowned independent computer privacy expert – has

PLAINTIFF ZANGO'S MOTION FOR TEMPORARY
RESTRANING ORDER – 1CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900**COPY**

1 conducted an exhaustive review of Zango's products and policies and pronounced them to be
 2 benign. *See* Declaration of Richard Purcell (hereinafter "Purcell Decl.").

3 Kaspersky's extensive, ongoing and irreversible attack on Zango warrants immediate
 4 injunctive relief. Here are some of the irreparable consequences Zango will continue to suffer
 5 absent injunctive relief:

- 6 • Kaspersky prevents Zango from reaching potential customers by blocking
 7 computer users who attempt to download and install Zango products from
 8 doing so without providing an opportunity for the user to consent to download.
- 9 • Zango customers who already have Zango products on their computers are
 10 unable to access Zango content. Accordingly, when these customers are
 11 unable to access their Zango programs after the installation of Kaspersky
 12 software, they unfairly (but understandably) blame Zango for the programs'
 13 disappearance. As a result, Kasperksy's product causes Zango to lose existing
 14 customers (and their goodwill) on daily basis.
- 15 • Because Zango does not collect personal identifying information from its
 16 customers, customers that Zango loses due to Kaspersky's attack are lost
 17 forever; similarly, Zango has no means of contacting its customers and
 18 warning them of the attack. For this reason, Kaspersky isn't just irrevocably
 19 erasing Zango products from users' computers, it is also irrevocably erasing
 20 hard-earned customers from the rolls of Zango's customer lists.
- 21 • Kaspersky software also disables Zango's website in such a manner that when
 22 a user opens the website in his or her internet browser, Kaspersky
 23 automatically deletes links to download Zango products without providing
 24 notice to the user. Thus, again potential future customers are prevented from
 25 accessing Zango's products, irrespective of their desire to do so.

Given these uncontested facts, there is no question that Zango will prevail in the
 claims set forth in the Complaint it quickly filed after learning of Kaspersky's misconduct.
 As a result of the widespread distribution of Kaspersky software, Zango is suffering massive
 irreparable harm to its business model and reputation ***right now***, and without quick

1 intervention by this Court, Zango will continue to suffer irreversible harm that will never
2 adequately be compensated at law. Accordingly, Zango seeks a temporary restraining order
3 compelling Kaspersky to immediately remove Zango's software programs from its programs
4 and its detection database, and to send an update to its existing customers.

5

6 II. STATEMENT OF FACTS

7 Zango is an online media company based in Bellevue, Washington that provides
8 consumers free access to a large catalog of online videos, games, music, tools and utilities.
9 Zango's catalog of content is offered to customers free of charge and is sponsored by
10 advertising that customers agree to view as a condition of using the products. Zango also
11 offers a premium version of its software that gives consumers access to Zango's content
12 catalog without advertising.

13 Zango takes extensive precautions to ensure that every Zango customer affirmatively
14 and knowingly consents to download, installation and continued usage of Zango software. An
15 independent audit conducted by Richard Purcell, CEO of Corporate Privacy Group, and
16 released on May 7, 2007, concluded that Zango is fully compliant with all reasonable and
17 recommended privacy requirements, and, in particular that Zango's privacy program ensures:
18 (1) user notification of the program or application's existence; (2) user consent to the
19 download or installation of the program or application; and (3) user control of the program or
20 application. *See* Purcell Decl., Ex. B. As a result of Zango's commitment to protecting the
21 privacy of its customers, Zango can be certain, and Mr. Purcell has verified, that all users who
22 have installed Zango's applications or products since January 1, 2006 have done so
23 consensually.

24
25

PLAINTIFF ZANGO'S MOTION FOR TEMPORARY
RESTRANING ORDER – 3

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

1 Kaspersky is in the business of developing and marketing various computer protection
2 and security software programs, including anti-virus protection. Kaspersky markets and
3 distributes computer protection and security software programs under its own name, and also
4 sells such programs to distributors and other original equipment manufacturers (“OEMs”).
5 One such program is “Kaspersky Anti-Virus” or “KAV.” Kaspersky utilizes KAV in its own
6 computer program, called “Kaspersky Internet Security” (“KIS”), and sells KAV to OEMs.
7 According to their website, Kaspersky has at least 50 and as many as 150 such OEM
8 customers, including industry leaders such as PC Tools, Checkpoint, and AOL.

9

10 A. **Kaspersky’s software damages Zango’s website and prevents users from
11 downloading Zango products from Zango’s website.**

12 On March 8, 2007, Zango’s testing lab discovered that KIS was damaging a Zango
13 website named “seekmo.com” by removing Zango weblinks from computers running the KIS
14 program. Essentially, when a user running KIS on their computer accessed the seekmo.com
15 website, KIS automatically and without notice to the user scanned the webpage and removed
16 all links that would allow the user to download Zango products from the webpage. Further
17 tests revealed that KIS was damaging and removing promotional links hosted by Zango
18 publishers as well.

19 Zango contacted Kaspersky on March 9, 2007, regarding the damage being done by
20 KIS. On March 12, 2007, Kaspersky admitted that KIS was damaging Zango’s website and
21 requested time to fix the issue. Testing performed by Zango’s lab on March 14, 2007 showed
22 that KIS was no longer damaging Zango’s webpage.

However, on March 21, 2007, Zango's lab discovered that similar damage (i.e., missing web links) was being caused by at least two OEM customers of Kaspersky's anti-virus application KAV, i.e., the same technology utilized in KIS. Zango was able to resolve the issue with one of these OEMs by notifying it of the problem; the other OEM refused to take any action. Zango also contacted Kaspersky directly and requested that Kaspersky issue an update to its OEM customers of KAV immediately in order to correct the problem. As of this date, Kaspersky has not done so, and Zango's website continues to be damaged by OEM customers of Kaspersky, preventing users from downloading Zango products.

B. **Kaspersky's program and software disables Zango's programs from the computers of Zango customers, and prevents users from downloading Zango products.**

On May 21, 2007, Zango testing of KIS version 6.0.2.621 revealed that, in addition to damaging Zango's website, Kaspersky software blocks installation of Zango software, and also directly attacks and disables Zango products already installed on a user's computer. First, a user who has KIS enabled is unable to download and install Zango products. Zango is thus prevented from reaching potential customers. Moreover, in the course of blocking installation of Zango's software, KIS identifies Zango products as "malicious" and as an "infection," although Kaspersky knows full well that this is a false and misleading description.

Second if KIS is enabled on a computer that already has Zango products downloaded and installed, KIS damages Zango's application in such a manner that Zango users are unable to access Zango's content, i.e., the videos, games, etc. that Zango provides in exchange for the user's agreement to view targeted advertising. In addition, every time Zango software

1 attempts to deliver a targeted ad, KIS opens a window prompting the user to click either
 2 “Allow” or “Deny.” Even if the user clicks “Always Allow,” KIS continues to require the
 3 user to choose “Allow each time.” Users are thus left with a computing experience consisting
 4 of endlessly being required to click “Allow” in order to continue browsing the Internet, while
 5 being prevented from accessing the Zango content that they wanted access to in the first
 6 place. It is not difficult to see that this experience will turn users against Zango.

7
 8 Although Zango has requested that Kaspersky remedy this situation, and issue an
 9 update to its OEMs, as of this date Kaspersky has taken no action to remedy the ongoing
 10 damage. Accordingly, Zango filed the Complaint in this matter on May 22, 2007, and
 11 provided Kaspersky with notice of intent to seek a temporary restraining order from the ex
 12 parte department of the King County Superior Court on May 24, 2007.

13
III. STATEMENT OF ISSUES

14
 15 Whether the Court should enter a temporary restraining order compelling defendant
 16 Kaspersky to immediately remove Zango’s software programs from its programs and its
 17 detection database, and to send an update to its existing customers.

18
IV. EVIDENCE RELIED UPON

19
 20 Zango relies upon the Declarations of Robert Purcell, Gregg Berretta, Steven Fogg
 21 and the exhibits attached therein.

22
V. AUTHORITY

23
A. Legal Standard

24
 25 Injunctive relief should be granted where a plaintiff shows: (1) that it has a clear legal
 or equitable right; (2) that it has a well-grounded fear of immediate invasion of that right; and

1 (3) that the acts complained of are or will result in actual and substantial injury. *Rabon v. City*
 2 *of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1988). These criteria must be examined "in
 3 light of equity" by balancing the relative interests of the party, and, where appropriate, the
 4 public interest. *Id.* Further, under *Spokane County v. AFSCE*, 76 Wn.App. 765, 770, 888
 5 P.2d 735 (1995), when the injunctive relief sought is a temporary restraining order, the
 6 plaintiff must show irreparable harm. As will be demonstrated, Zango satisfies each
 7 requirement in this case and the balancing of the equities favors granting a temporary
 8 restraining order.

9

10 **B. Zango has a Clear Legal or Equitable Right.**

11 When deciding whether a party has a clear legal or equitable right, this court examines
 12 the likelihood that the moving party will prevail on the merits. *Kucera v. DOT*, 140 Wn.2d
 13 200, 216, 995 P.2d 63 (2000).

14
 15 Zango's first cause of action against Kaspersky, intentional interference with Zango's
 16 contractual relations or business expectancy, requires the following elements:

17
 18 (1) the existence of a valid contractual relationship or business expectancy;
 19 (2) that the defendant had knowledge of that relationship; (3) an intentional
 20 interference inducing or causing a breach or termination of the relationship or
 21 expectancy; (4) that defendant interfered for an improper purpose or used
 22 improper means; and (5) resultant damage.

23
 24 *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997)
 25 (internal citations omitted).

26
 27 The likelihood that Zango will prevail on this cause of action is overwhelming. Zango
 28 has a valid contractual relationship with its existing customers and a valid business
 29 expectancy in future customers of Zango products. *See Newton Ins. Agency & Brokerage*,

1 *Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002) (“A valid
 2 business expectancy includes any prospective contractual or business relationship that would
 3 be of pecuniary value.”). Kaspersky clearly had knowledge of the relationship between
 4 Zango and its customers as well as Zango’s prospective business prospects and equally clearly
 5 purposefully interfered with those relations and prospects by disabling Zango’s software and
 6 by preventing any future customers from being able to install Zango software. *See id.*
 7 (“Interference with a business expectancy is intentional ‘if the actor desires to bring it about
 8 or if he knows that the interference is certain or substantially certain to occur as a result of his
 9 action.’”) (quoting Restatement (Second) Of Torts § 766B cmt. d). Moreover, Kaspersky
 10 interfered for an improper purpose – advancement of its own commercial interests at Zango’s
 11 expense – and its bad faith is evident by its continuing refusal to remedy the ongoing damage
 12 being inflicted on Zango. Finally, the resultant damage to Zango is self-evident: Kaspersky’s
 13 actions have caused and continue to cause substantial financial damage by severing the
 14 relationship between Zango and its current and potential future customers (in addition to the
 15 damage Zango is suffering to its reputation and business model).

16 Zango is very likely to prevail on its second cause of action against Kaspersky as well.
 17 Liability for trade libel attaches where a defendant: (1) publishes false and disparaging
 18 statements concerning the quality of the plaintiff’s product; (2) does so with the intent that
 19 such publication results in harm to the pecuniary interest of the plaintiff, or either recognizes
 20 or should recognize that such harm is likely; and (3) does so with actual malice (i.e., either
 21 knows that the statement is false or acts in reckless disregard of its truth or falsity).

22 Restatement (Second of Torts) § 623A; *see also Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 820

23
 24
 25 PLAINTIFF ZANGO’S MOTION FOR TEMPORARY
 RESTRAINING ORDER – 8

26
 27 CORR CRONIN MICHELSON
 BAUMGARDNER & PREECE LLP
 1001 Fourth Avenue, Suite 3900
 Seattle, Washington 98154-1051
 Tel (206) 625-8600
 Fax (206) 625-0900

(9th Cir. 1995) (assuming that Washington recognizes trade libel based on Washington Court of Appeals decision citing Restatement § 623A for the proposition that plaintiffs seeking damages in disparagement face a higher burden of proof than those seeking damages in defamation). Here, Kaspersky has labeled, and continues to label, Zango's products as an "infection," as "malicious." Labeling Zango products in this manner is likely to mislead existing customers into believing that Zango applications are attempting to damage their computers or somehow compromise their privacy, which, as Kaspersky knows, is not the case. Zango has worked hard to achieve a good reputation in the marketplace, and to foster relationships with customers, content-providers, and distribution channels. Kaspersky's baseless attacks on Zango's products threaten all that Zango has worked to achieve.

Zango will likewise be able to establish its cause of action under the Washington Consumer Protection Act ("CPA"). A plaintiff makes a *prima facie* showing of a CPA violation when it shows (1) an unfair or deceptive act; (2) in trade or commerce; (3) impacting the public interest; (4) injuring Plaintiff in its business or property; and (5) causation.

Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Kaspersky specifically markets itself as a purveyor of security software that protects consumers from so-called "malware." Kaspersky's unfair and deceptive conduct thus has a public interest impact, and the conduct clearly injured and will continue to injure Plaintiff's business, reputation, and goodwill.

C. Zango Has a Well-Grounded Fear of Immediate Invasion of Its Rights

When a defendant has already invaded the plaintiff's rights, the fear of invasion is self-evidently "well-grounded." *See generally Piepkorn v. Adams*, 102 Wn. App. 673, 685,

10 P.3d 428 (2000) (well-grounded fear of immediate invasion of plaintiff's right established
 2 by fact that the right had already been invaded). Such is the case here as Kaspersky's attacks
 3 on Zango's website and programs have been ongoing since at least March 8, and likely since
 4 before that date.

5 **D. Kaspersky's Conduct Has Caused, and Will Continue to Cause "Irreparable"
 6 and "Actual and Substantial" Injury to Zango.**

7 Courts routinely recognize that significant loss of customers or business goodwill and
 8 damage to business reputation may constitute substantial or irreparable harm justifying
 9 injunctive relief. *See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable
 10 Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("[W]hen the failure to grant preliminary
 11 relief creates the possibility of permanent loss of customers to a competitor or the loss of
 12 goodwill, the irreparable injury prong is satisfied."); *K-Mart Corp. v. Oriental Plaza, Inc.*,
 13 875 F.2d 907, 915 (1st Cir. 1989) ("[H]arm to goodwill, like harm to reputation, is the type of
 14 harm not readily measurable or fully compensable in damages -- and for that reason, more
 15 likely to be found 'irreparable.'"); *Ginorio v. Gomez*, 301 F. Supp. 2d 122, 134 (D.P.R. 2004)
 16 (plaintiffs sought an injunction to stop the defendant from revoking their insurance licenses;
 17 court found that plaintiff had established irreparable injury where evidence showed that the
 18 "the insurance business is one based on trust and . . . the revocation of plaintiffs licenses, even
 19 if temporary, would result in unmeasurable harm to plaintiffs' reputation[,] and that plaintiffs
 20 "existing clients and any potential new ones would have to take their business elsewhere.").

21 Here, as a result of Kaspersky's conduct, Zango has suffered damages to its customer
 22 base, its reputation, and its business model. In addition to the direct financial damages being
 23

inflicted by Kaspersky, Zango faces the ongoing prospect of permanent loss of customers to competitors in the marketplace, loss of goodwill, and damage to its reputation. These are not losses that are easily recouped or which may be cured solely by recovery of money damages.

E. The Balance of Equities Favors Granting a Temporary Restraining Order.

The purpose of a temporary restraining order is to preserve the status quo pending further court proceedings. *State ex rel. Payless Drug Stores v. Sutton*, 2 Wn.2d 523, 531, 98 P.2d 680 (1940). The status quo is “the last, actual, peaceable, noncontested status which preceded the pending controversy.” *Id.* at 532. This Court has considerable discretion in granting or withholding this injunctive relief, and whether injunctive relief should be granted is determined in light of the relative equities of the parties. *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). Here, Zango will suffer incalculable harm if the temporary restraining order is not granted. Day by day, Zango is losing its customers and suffering damage to its goodwill and reputation. Conversely, the relief requested by Zango asks very little of Kaspersky, and would have no effect on its existing customer base or future customers. Given the significant ongoing damages being suffered by Zango, and the ease with which Kaspersky may remedy the situation, balancing of the equities favors granting the present motion.

VI. CONCLUSION

For the foregoing reasons, this Court should issue a temporary restraining order compelling Kaspersky to remove Zango's software programs from its programs and detection database, and to send an update to its existing customers.

DATED this 25th day of May, 2007.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

~~Kelly P. Corr, WSBA #00555
Steven W. Fogg, WSBA #23528
Attorneys for Plaintiff
Zango, Inc.~~